STATE OF MICHIGAN

COURT OF APPEALS

STEFANIE STEINBERG, Plaintiff-Appellant,	UNPUBLISHED January 9, 2014
v	No. 315796 Oakland Circuit Court Family Division
JORDAN STEINBERG, Defendant-Appellee.	LC No. 2011-789462-DM

Before: METER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Plaintiff appeals as of right the award of custody and the property settlement from a judgment of divorce. We affirm in part, reverse in part, and remand.

Plaintiff first argues that the trial court erred when it awarded joint legal and physical custody and unsupervised parenting time for defendant. We disagree.

Custody orders "shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). Under the "great weight of the evidence" standard, the trial court's determination will be affirmed unless the evidence clearly preponderates in the other direction. *Pierron*, 486 Mich at 85. "The trial court's ultimate custody decision is reviewed for an abuse of discretion." *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009).

ESTABLISHED CUSTODIAL ENVIRONMENT

MCL 722.27(1)(c) provides, in pertinent part:

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

See also *Pierron*, 486 Mich at 85-86. The trial court "may not change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." *Id*. at 86 (citations and internal quotation marks omitted).

The trial court found "an established custodial environment exist[ed] with both parents because "[t]he minor child looks to both [p]laintiff and [d]efendant for emotional support, guidance, discipline, the necessities of life, and parental comfort." The court also "considered the age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship," and the court also noted the number of overnights the minor child had been ordered to spend with defendant.

Plaintiff argues that the court's finding was against the great weight of the evidence because plaintiff "has been the party [who] consistently cares for [the minor child's] needs" and defendant "has displayed poor judgment and parenting choices." She also asserts that "[s]tating certain factors does not equal consideration." With regard to the question of an established custodial environment, MCL 722.27(1)(c) requires a trial court to consider whether "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort," and the "age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered." The statute does not compel the trial court to make particular findings concerning the factors it considered, and plaintiff offers no evidence to contradict the trial court's statement that it actually considered those factors.

The court's finding that an established custodial environment existed with both parties was not against the great weight of the evidence. It was clear from the record that defendant regularly exercised his parenting time under the interim order, and, although he admitted that plaintiff took the minor child to most of his pediatrician appointments, defendant said he took the minor child himself before the parties separated. His disciplinary methods were usually appropriate; he spanked the minor child "once that [he] recall[ed]" and said he did not believe corporal punishment was appropriate discipline. He took the child on recreational trips, including one to the Woodward Dream Cruise. Although defendant's having taken the child unsupervised to a water park violated a parenting-time order, that violation was not relevant to the established-custodial-environment finding. See *Berger v Berger*, 277 Mich App 700, 707; 747 NW2d 336 (2008) ("A custodial environment can be established . . . in violation of a custody order . . . .").

Because the evidence did not clearly preponderate in the other direction, the trial court's finding was not against the great weight of the evidence. *Pierron*, 486 Mich at 85; see also *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000) (established custodial environment existed with both parents despite disparities concerning financial support and concerning the children's primary residence). Accordingly, the trial court properly applied the clear-and-convincing-evidence standard to plaintiff's request to modify the established custodial environment to grant her sole physical and legal custody of the minor child. See *Pierron v Pierron*, 282 Mich App 222, 245; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010) (holding that the clear-and-convincing-evidence standard applies when there is an established custodial environment with both parents).

CUSTODY

"Above all, custody disputes are to be resolved in the child's best interests. Generally, a trial court determines the best interests of the child by weighing the twelve statutory factors outlined in MCL 722.23." *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001) (citation omitted). Plaintiff first argues that factor (b),[1] which the trial court found favored neither party, favored her because she was more involved in her religious congregation and the child's education, defendant "has poor judgment as a parent," and plaintiff "provid[ed] for [the child's] psychological, emotional, and physical needs." The trial court acknowledged that defendant had not taken the child to Sunday school since joining the congregation and that plaintiff was concerned that defendant "made poor choices in child rearing and guidance," but balanced those findings with plaintiff's father's concession that defendant teaches the minor child "how to count, fish, organize toys, and engage in creative play" and concluded that "[b]oth parties are able to provide the [minor] child with love, affection and guidance . . . ." Because the record evidence did not clearly preponderate in the other direction, the trial court's finding on factor (b) was not against the great weight of the evidence. *Pierron*, 486 Mich at 85.

Plaintiff argues that factor (c),[2] which the trial court found favored neither party, favored her because defendant misidentified the child's pediatrician and dentist and took the child to "relatively few appointments," and the court also misidentified the child's pediatrician. Plaintiff also asserts that the parties jointly pay for the child's health care and she "consistently handled [the child's] medical, psychological, and emotional care." However, she makes no specific citations to either law or facts in evidence in support of her position that this factor favored her request for sole physical and legal custody. "When a party merely announces a position and provides no authority to support it, we consider the issue waived." *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). In any case, the trial court properly detailed the parties' employment, income, and health-care coverage histories and noted that "[b]oth parties have taken [the child] to his medical doctor appointments in the past," and the latter statement is supported by the record. We find no basis for disturbing the trial court's finding concerning this factor.

Plaintiff argues that factors (d)[3] and (e),[4] both of which the trial court found favored neither party, favored her because the minor child "consistently" lived with her, defendant lived

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[1] "The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b).

[2] "The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." MCL 722.23(c).

[3] "The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d).

[4] "The permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e).

with his mother, and the child "does not reside at [defendant's mother's] home." Again, plaintiff does not cite to the record for this argument. See *Nat'l Waterworks, Inc*, 275 Mich App at 265; see also *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004), and MCR 7.212(C)(7) ("Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court."). Defendant testified that he lives with his mother in a two-story condominium, and the child sleeps by himself in the master bedroom when he stays there. The trial court's findings that these factors favored neither party did not clearly preponderate in the other direction, *Pierron*, 486 Mich at 85, because no evidence suggested that each of the parties' homes did not offer the minor child permanence and a "stable, satisfactory environment." MCL 722.23(d) & (e).

Plaintiff argues that factor (f),[5] which the trial court found "slightly favor[ed p]laintiff," "should simply favor" her because the court's findings "only address[ed] issues relating to [defendant]." However, because the trial court found that she *was* favored by this factor, albeit slightly, it is not clear from the three sentences plaintiff dedicates to this factor in her brief on appeal what relief she seeks from this Court. Plaintiff argues that factor (g),[6] which the trial court found favored neither party, should have favored her because the court did not state in its findings that a clinical psychologist diagnosed defendant with an impulse control disorder and made "a recommendation to address sexual dysfunction and possible cannabis abuse." The trial court noted that defendant has "a history of mental health issues," however, and while "the finder of fact must state his or her factual findings and conclusions under each best[-]interest factor[, t]hese findings and conclusions need not include consideration of every piece of evidence entered and argument raised by the parties." *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). The court's overview of the parties' mental and physical health, including the fact that each has issues and sees a therapist, was sufficient for this Court to determine that the evidence did not clearly preponderate in the other direction. *Id.*

Plaintiff argues that factor (h),[7] which the trial court found favored neither party, should have favored her. Specifically, she complains that the trial court did not discuss the parties' "involvement with school" and "failed to make findings as required." Plaintiff does not offer any authority that bound the court to make additional findings. The trial court was not obligated to acknowledge every fact in evidence, *MacIntyre*, 267 Mich App at 452, and made extensive findings with respect to the minor child's home, school, and community records, including the two complaints to Child Protective Services against defendant. The record evidence did not clearly preponderate against the court's conclusion concerning factor (h), and, therefore, it was not against the great weight of the evidence. *Pierron*, 486 Mich at 85.

[5] "The moral fitness of the parties involved." MCL 722.23(f).

[6] "The mental and physical health of the parties involved." MCL 722.23(g).

[7] "The home, school, and community record of the child." MCL 722.23(h).

Plaintiff argues that factor (j),[8] which the trial court found favored neither party, should have favored her. In support, plaintiff asserts that the trial court made incorrect findings, did not "make particularly relevant findings, and fail[ed] to draw any conclusions." She states that the trial court incorrectly found that defendant allowed plaintiff to spend Mother's Day with the child, but does not cite to the record to support that statement; defendant testified that "[s]he did see him on Mother's Day." On the other hand, the court noted plaintiff's admission that she "withheld parenting time for [d]efendant while CPS cases were pending . . . ." The finding that factor (j) favored neither party was not against the great weight of the evidence. *Pierron*, 486 Mich at 85.

Plaintiff also argues that factor (k),[9] which the trial court found favored neither party, should have favored her because defendant wrote a letter to Easter Seals expressing his belief that corporal punishment was appropriate, and the court should not have believed his trial testimony that he no longer held that belief. Defendant said at "one time [he] did strike [the minor child]," but he "never spanked him since then," "it's never been a regular occurrence," and defendant was "very set against that" as a method for discipline. This Court defers to "the trial court's superior position to assess the credibility of the witnesses appearing before it and will not revisit those assessments in this forum." *Shann v Shann*, 293 Mich App 302, 307; 809 NW2d 435 (2011).

We find no basis for reversal with regard to the court's decision concerning the statutory factors and the custody order.

Plaintiff specifically argues that the trial court's decision to award joint *legal* custody was an abuse of discretion because "its findings [were] insufficient under MCL 722.26a and the parties [were] unable to communicate." The trial court "shall determine whether joint custody is in the best interest of the child" by considering the best-interests factors, MCL 722.23, and "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a; *Shulick v Richards*, 273 Mich App 320, 326; 729 NW2d 533 (2006). The trial court stated that plaintiff "testified that the parties do not communicate well," but found that "no evidence was presented to the court to indicate that the parties can not cooperate and agree concerning important decisions affecting the welfare of [the child]." Plaintiff advances no such evidence from the record to rebut that finding. Therefore, it was not contrary to the great weight of the evidence, and the trial court's ultimate decision to award joint legal custody was not an abuse of discretion. *Pierron*, 486 Mich at 85; *McIntosh*, 282 Mich App at 475.

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[8] "The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." MCL 722.23(j).

[9] "Domestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k).

SUPERVISION OF PARENTING TIME

Plaintiff argues that the trial court abused its discretion when it failed to continue supervised parenting time for defendant, and when it failed to address parenting-time factors under MCL 722.27a. "Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents." MCL 722.27a(1); see also *Shade v Wright*, 291 Mich App 17, 31; 805 NW2d 1 (2010). "A parenting time order may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of parenting time by a parent, including . . . [r]equirements that parenting time occur in the presence of a third person or agency." MCL 722.27a(8)(f). MCL 722.27a(6) lists eight factors, as well as a catchall provision, that the court "*may* consider . . . when determining the frequency, duration, and type of parenting time to be granted . . . ." (Emphasis added.) See also *Gaudreau v Kelly*, 298 Mich App 148, 156; 826 NW2d 164 (2012) ("The child's best interests govern the modification of parenting-time orders."). Plaintiff is not eligible for relief on the basis that the trial court "fail[ed] to address the statutory factors concerning parenting time" because the word "may" indicates that the factors are permissive, not mandatory. See *Haring Charter Twp v City of Cadillac*, 290 Mich App 728, 749; 811 NW2d 74 (2010), aff'd 490 Mich 987 (2012).

The trial court ordered, based on the Friend of the Court family counselor's recommendation "and the fact that both parties have engaged and participated in parenting classes and therapy," that defendant receive unsupervised parenting time with the minor child on alternating weekends, one overnight during the week, and two nonconsecutive weeks during the summer.

Plaintiff argues that the trial court's decision to order unsupervised parenting time was contrary to the psychologist's recommendation. However, she recommended supervision only "until [defendant] was better able to demonstrate that he was making more positive changes in his behavior and had a better understanding . . . of his . . . parenting techniques."[10] The trial court, months after the presentation of the psychological evidence cited by plaintiff, found that "both parties have engaged and participated in parenting classes and therapy." Again, there is a presumption that it is "in the best interests of a child for the child to have a strong relationship with both of his or her parents." MCL 722.27a(1). Given the trial court's finding, supported by the record, that both parties participated in parenting classes, we find no basis for a remand or reversal concerning this issue.

PROPERTY DIVISION

Plaintiff next argues that the trial court erred when it designated defendant's retirement accounts as marital property and failed to divide the property between the parties. We agree.

[10] Similarly, a counselor recommended supervision "while [defendant] completes parenting classes."

> [I]n granting a divorce judgment, the trial court must make findings of fact and dispositional rulings. The trial court's factual findings will not be reversed unless they are clearly erroneous, i.e., if this Court is left with the definite and firm conviction that a mistake has been made. If this Court upholds the trial court's findings of fact, it must then decide whether the dispositional ruling was fair and equitable in light of those facts. The trial court's dispositional ruling is discretionary and will be affirmed unless this Court is left with the firm conviction that it was inequitable. [*Licavoli v Licavoli*, 292 Mich App 450, 452-453; 807 NW2d 914 (2011) (citations and internal quotation marks omitted).]
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> Upon . . . a divorce . . . the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party by reason of the marriage, or for awarding to either party the value thereof, to be paid by either party in money. [MCL 552.19.]

"The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. The trial court need not divide the marital estate into mathematically equal portions, but any significant departure from congruence must be clearly explained." *Berger*, 277 Mich App at 716-717 (citation omitted). Trial courts may consider the following factors in dividing marital property:

> (1) the duration of the marriage, (2) the contributions of the parties to the marital estate, (3) the age of the parties, (4) the health of the parties, (5) the life situation of the parties, (6) the necessities and circumstances of the parties, (7) the parties' earning abilities, (8) the parties' past relations and conduct, and (9) general principles of equity. [*Id*. at 717.]

"When dividing marital property, a trial court may also consider additional factors that are relevant to a particular case. The trial court must consider all relevant factors but not assign disproportionate weight to any one circumstance." *Id*. (internal citations and quotation marks omitted).

After citing the above factors, the trial court found:

> Plaintiff and [d]efendant were married for 9 years. Defendant is 46 years old. Plaintiff is 47 years old. Plaintiff was a stay-at-home mother during the marriage and recently entered the workforce as a bookkeeper and computer assistant. Defendant was terminated from his employment as a quality engineer with Rex Materials in Fowlerville, MI on January 26, 2012. He was earning $75,000.00 per year. He is currently receiving $724.00 bi-weekly in unemployment compensation. He claims to be doing odd jobs.
>
> Both parties are in fair health and capable of working.

The parties each received the vehicles they used during the marriage, one-half of their 2011 income-tax refund, one-half of their bankruptcy surplus, and one-half of the household furnishings, each of which was designated as marital property. They were to equally divide

certain debts. Of the remaining assets designated as "marital property," plaintiff received only the funds in her checking account, $658.75, and defendant received the funds in his four retirement accounts and his checking account, which totaled $37,157. Because this is a "significant departure from congruence," the trial court was required to explain the disparity and failed to do so. *Berger*, 277 Mich App at 717. This Court held, in *Berger*, that neither the defendant husband's higher income nor his extramarital affair justified an award of 70 percent of the marital estate to the plaintiff wife and 30 percent to the defendant husband. *Id*. at 719-722. Because the disparity in this case is much greater, it follows from *Berger* that the trial court's failure to explain its property disposition was erroneous, and we thus remand for further findings.[11]

DISQUALIFICATION OF TRIAL JUDGE

Plaintiff next argues that this matter should be remanded to a different trier of fact. We disagree.

To preserve a motion for disqualification for appellate review, the motion "must be filed within 14 days after the moving party discovers the basis for disqualification, the moving party must include in the motion all grounds for disqualification known at the time the motion is filed, and the moving party must submit an affidavit." *Kloian v Schwartz*, 272 Mich App 232, 244; 725 NW2d 671 (2006); see also MCR 2.003(D). This issue is arguably not preserved for appellate review. At any rate, we find no basis for relief.

"The general concern when deciding whether to remand to a different trial judge is whether the appearance of justice will be better served if another judge presides over the case." *Bayati v Bayati*, 264 Mich App 595, 602; 691 NW2d 812 (2004). This Court may remand to a different judge "if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication." *Id*. at 603 (citation omitted). That the judge reached a wrong legal conclusion is not a sufficient reason; rather, the moving party "must demonstrate that the judge would be unable to rule fairly on remand given his past comments or expressed views." *Id*.

The record does not reveal bias on the part of the trial judge, nor does plaintiff allege any. The crux of plaintiff's argument, which contains no citations to the record, see MCR 7.212(C)(7), is that the trial court's opinion and order "lack[ed] obvious support for the . . . ultimate dispositional decisions" because defendant "did not present a case or any corroborating witnesses" and "lack[ed] credibility," and "[a]ll the other witnesses at trial . . . were supportive of [plaintiff's] position." We have refuted in this opinion the notion that the trial court's custody and parenting-time decisions were not supported by the record. Moreover, "[r]epeated rulings against a party, no matter how erroneous, or vigorously or consistently expressed, are not disqualifying. Rather, plaintiff must demonstrate that the judge would be unable to rule fairly on remand given [her] past comments or expressed views." *Bayati*, 264 Mich App at 603 (citation

[11] The court may order a new distribution or offer an explanation for the disparity of the award.

omitted). Further, this Court defers to the trial court's assessments of credibility. *Shann*, 293 Mich App at 307. Because plaintiff has not shown that the trial judge would be unable to rule fairly on remand, reassignment to another judge is not warranted.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Henry William Saad